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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MEDTRONIC, INC.,

v.

CHARLES F. BENDA, EMIL CONDE and
WILLIAM C. CAIN, Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decision of the United States Supreme Court in Beacon Theatre, Inc. v. Westover, 369 U.S. 500, 795 S.Ct. 948.

2. Whether the decision departs from the accepted and usual course of judicial proceeding which was mandated by the United Supreme Court in Beacon Theatre, Inc. v. Westover, 369 U.S. 500, 795 S.Ct. 948.

3. Whether a jury trial of common substantial issues is lost when equitable rights are also in the case.

4. Whether a Federal Appeals Court may adopt the decision of a trial court verbatim adding only incidental language.

5. Whether a Federal Appeals Court without review can eliminate issues raised by appellants including a constitutional issue raised throughout all of the proceedings.

6. Whether the decision of the Court of Appeals for the Seventh Circuit is inconsistent with its own decision, Machlett Laboratories, Inc. v. Techny Institute, Inc., 665 F.2d 795 (1981).

TABLE OF CONTENTS

	Page
Parties	Cover
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes	2
Statement	11
Argument	19
Conclusion	34
Appendix A	1a
Appendix B	32a
Appendix C	33a

TABLE OF AUTHORITIES

Cases:	Page No.
Aberti v. Cruise, 383 F.2d 268 (4th Cir., 1967)	29
Beacon Theatre, Inc. v. Westover, 369 U.S. 500, 795 S.Ct. 948	19, 20, 21, 24, 29
Consolidated Coal Co. v. Disabled Minors, 442 F.2d 1261 (1971)	29
Dairy Queen, Inc. v. Wood, (1962) 369 U.S. 469, 8 L.Ed. 44, 82 S.Ct. 894	21, 29
Dawson v. Contractors Transport Corp., (1972) 151 App. DC 401, 467 F.2d 727	21
Empire Life Insurance Company of America v. Valdak Corporation, (5th Cir., 1972) 468 F.2d 334	28
Heflin v. U.S., Ala.1959, 79 S.Ct. 451, 358 U.S. 415, 3 L.Ed.2d 407	20
Leahy v.U.S. (9th Cir., 1959) 272 F.2d 487	28
Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d 795 (7th Cir. 1981)	30
Pennsylvania R. Co. v. O'Rourke, N.Y.1953, 73 S.Ct. 302, 344 U.S. 334, 97 L.Ed. 367	20

First Amendment of the United States Constitution	2, 8
Seventh Amendment of the United States Constitution	2, 8
28 United States Code, §1292(a)	2, 8
Federal Rules of Civil Procedure, Rule 13(a)	2, 3, 17
Federal Rules of Civil Procedure, Rule 13(b)	2, 4, 17
Federal Rules of Civil Procedure, Rule 13(c)	2, 4, 17
Federal Rules of Civil Procedure, Rule 38(a)	2, 4, 17
Federal Rules of Civil Procedure, Rule 39(a)	2, 4
Federal Rules of Civil Procedure, Rule 42(b)	2, 5, 21,22
Federal Rules of Civil Procedure, Rule 57	2, 6, 21,22
Federal Rules of Civil Procedure, Rule 65(d)	2, 7

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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Richard E. Zulkey, on behalf of Charles F. Benda, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals (App. A, infra, 1a-8a) is noted at 688 F.2d 841 (7th Circuit 1982). The published opinion of the Court of Appeals (App. A, infra, 1a-31a) incorporates its unpublished opinion and the opinion of the

District Court and is not reported. The opinion of the District Court (App. A, infra, 9a-26a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, 1a-31a) was entered on July 13, 1982. A timely petition for rehearing was denied on September 2, 1982 (App. B, infra, 32a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues argued in this petition involve the following Rules of Civil Procedure for the United States District Court: Rules 13(a), (b) and (c), 38 (a), 39(a), 42(b), 57 and 65(d); U.S. Constitution, Amendment I and U.S. Constitution, Amendment VII; and 28 U.S.C. 1292(a).

RULE 13 - Counterclaim and Cross Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

But the pleading need not state the claim if: (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to the pleading is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

RULE 38(a)

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the U.S. shall be preserved to the parties inviolate.

RULE 39(a)

When trial by jury has been demanded as provided in Rule 38, the action

shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) the parties or their attorneys of record, by written stipulation failed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the U.S.

RULE 42(b)

Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be condusive to expedition and economy, may order a

separate trial of any claim, cross-claim, or third-party claim, or if any separate issue or if any number of claims, or issues always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the U.S.

RULE 57 - Declaratory Judgments.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C. §2201 shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the matter provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of

an action for a declaratory judgment and may advance it on the calendar.

RULE 65(d)

Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

U.S. CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedon of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for redress of grievances.

U.S. CONSTITUTION, AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. 1292(a)

The courts of appeals shall have jurisdiction of appeals from: (1)

Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property; (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; (4)

Judgments in civil actions for patent infringement which are final except for accounting.

STATEMENT

Medtronic, Inc. (hereinafter referred to as "Medtronic") is the world's largest manufacturer of ventricular and atrial pacing equipment commonly known as pacemakers. These devices are implanted by surgeons inside the body near the chest bone and are supposed to control the heart rate in patients.

The procedure for implanting a pacemaker consists of opening the patient by surgical operation, placing the pacemaker near a suitable anchor, attaching the leads from the device to the heart, testing the device and closing the patient.

The implant procedure is performed in a hospital operating room followed by a short stay in the recovery room and a week or so as an in-patient.

The average age of a pacemaker implant patient is 68 years old. Medicare pays for

most of these procedures.

Medtronic has marketed its pacemakers through direct contact with physicians, surgeons and cardiologists throughout the world. Medtronic educates the physicians, surgeons and cardiologists through seminars, conventions, symposiums, publication of its own quarterly medical journal and extensive advertising in medical journals. Medtronic also flies medical personnel to its plant in Minnesota for a first hand look at its products and lavishly entertains the physicians, surgeons and cardiologists.

Along with the above marketing techniques Medtronic employs salesmen to deliver the pacemakers, to attend implant operations and to wine and dine the medical professinals.

Charles F. Benda (hereinafter referred to as "Benda") came to Medtronic in April of 1977. Benda had extensive medical training before becoming employed at

Medtronic. This experience included a tour of duty as a medic instructor with the U.S. Army Medical Corps; a research position at the University of Chicago in arteriosclerosis research; sales work for Parke-Davis Company selling pharmaceuticals, medical-surgical instruments and medical electronic devices for four years; three years with Polaroid; and one year as a sales director of Camag, Inc., a Swiss company specializing in biochemical analytical equipment.

After a short three week initial training period, Benda was on his own selling Medtronic pacemakers, attending operations, and entertaining doctors.

Benda performed exceptionally for Medtronic producing high volume sales accounting for over 2,000 units being sold during his employment. Benda, while employed by Medtronic, was on 24 hour call, 7 days a week.

Benda was one of Medtronic's best sales representatives in the country up to the time of his resignation on August 31, 1981. Just prior to the time of his resignation, Medtronic developed a new compensation plan which rewarded those who increased market share. In Benda's opinion the only way this could be done was by increasing the patient population in his territory. When Medtronic confirmed this by urging Benda to create those false unnecessary markets, he refused and ultimately terminated his position and formed an independent sales agency pursuant to written contract with Intermedics, Inc., a major competitor of Medtronic.

The lawsuit followed.

This action was commenced in the United States District Court for the Northern District of Illinois by Medtronic, a Minnesota corporation.

Medtronic filed a Complaint for Declaratory Relief on September 2, 1981, seeking a declaration of the enforceability of a restrictive covenant contained in an Employment Agreement entered into between Medtronic and Benda on April 11, 1977. The restrictive covenant contained the following language:

> "For 360 days after termination of my employment with the Company, I will not attempt to divert any Company business by soliciting, contacting, or communicating with any customers for the Company's products with whom I, or employees under my supervision, had contact during the year preceding termination of my employment."

Medtronic's Declaratory Complaint prayed for a declaratory judgment declaring the validity of the employment agreement and construing the non-compete clause as prohibiting the defendant from acting in breach of his employee agreement by soliciting, contacting, or communicating with any customers of the plaintiff located in his former Medtronic sales

territory, and all physicians and surgeons associated with certain hospitals with whom defendant had had contact during the year preceding termination.

Benda answered the Complaint by agreeing that an actual controversy existed and sought a declaratory judgment declaring the employment agreement invalid and asserted the affirmative defenses of lack of consideration and that the non-compete clause is an unreasonable restraint of trade.

Benda, at the same time he filed his Answer, filed a three count Counterclaim raising the following issues: (1) Medtronic wrongfully obtained a temporary restraining order to enforce the non-competition agreement; (2) Medtronic committed an unlawful restraint of trade by consistently enforcing the non-competition agreement and by creating false markets and otherwise restricting its salesmen; and (3) Medtronic breached

the contract by forcing Benda to create a pacemaker market where none was needed for which reason Benda terminated his employment. Benda had filed his Counterclaim, Counts I, II and III, pursuant to Federal Rules of Civil Procedure Rules 13(a), (b) and (c). Count I was compulsory, Count II permissive, and Count III partially compulsory and partially exceeding the issues of the Complaint.

Benda filed a timely jury demand for trial of the issues of the Complaint, Answer, Affirmative Defenses and Counterclaim pursuant to Rule 38 of the Federal Rules of Civil Procedure.

On October 29, 1981, Medtronic filed an Amended Complaint seeking the additional relief of injunction.

Trial began November 9, 1981, upon Medtronic's Complaint for Declaratory and Injunctive Relief. After the trial began

the Court upon its own Motion pursuant to Federal Rule 38(b) delivered a memorandum opinion severing Benda's Counterclaim and striking the jury demand with respect to the issues of the Complaint, Answer and Affirmative Defenses.

Benda filed a Motion to Reconsider the denial of his right to have a jury decide the case immediately upon the trial court's determination to deny the jury trial, which motion was denied.

After the trial, but before a decision was reached, Benda filed a Motion to Stay the proceedings pending disposition of his Counterclaim by a jury, which motion was denied.

On February 4, 1982, the trial court issued a memorandum opinion and interlocutory order granting Medtronic injunctive and declaratory relief and costs. The trial court entered those findings without prejudice to any additional rights Medtronic might have to

petition the Court for appropriate relief for violations of the non-competition agreement during the pendency of any restrainingorder.

The decision was appealed to the United States Court of Appeals which appeal was decided by unreported order on July 13, 1982, but subsequently the Court decided to issue the decision as an opinion adopting verbatim the trial court's memorandum opinions dated November 9, 1981 as to the denial of the jury, and February 4, 1982 as to the issues tried with inclusion of the previously unreported order.

ARGUMENT

I

The decision of the Court of Appeals for the Seventh Circuit in Medtronic is in direct conflict with the decision of the United States Supreme Court in Beacon Theatre, Inc. v. Westover, 369 U.S. 500,

795 S.Ct. 948, Heflin v. U.S., 1959, 79 S.Ct. 451, 358 U.S. 415, 3 L.Ed.2d 407, Pennsylvania R. Co. v. O'Rourke, N.Y. 1953, 73 S.Ct. 302, 344 U.S. 334, 97 L.Ed. 367.

The decision also departs from the accepted and usual course of judicial proceeding which was mandated by the United States Supreme Court in Beacon Theatre, Inc. v. Westover, 369 U.S. 500, 795 S.Ct. 948.

The U.S. Constitution, Amendment VII provides in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of

the United States shall be preserved to the parties inviolate. Rule 38(a) and FRCP. Also, Rule 57 and 42(b) FRCP specifically preserve the right in declaratory actions and where the Court orders separate trials.

The fact that a claim in this case is equitable does not deprive the claimant of a right to a jury trial on factual issues. If there are factual issues common to both legal and equitable claims joined in the same suit, any party has a right to a jury determination of these issues before the Court rules on the equitable claim. Dairy Queen, Inc. v. Wood (1962) 369 U.S. 469, 8 L.Ed. 44, 82 S.Ct. 894; Dawson v. Contractors Transport Corp. (1972) 151 App. DC 401, 467 F.2d 727; Beacon Theatre, Inc. v. Westover, supra.

In the case at hand, the Court severed Defendant's legal counterclaims to be tried at a later time. However, the factual issues to be determined in the

legal counterclaims and defenses are factual issues common to both those legal counterclaims and Plaintiff's declaratory claim. Thus, the Court severed without preserving inviolate the right to a jury trial as required by Rule 42(b). Furthermore, the declaration of a contract overlaps the boundaries of legal and equitable claims as recognized by Rule 57 itself.

The Court of Appeals' decision, on page 3, points out the fact that there was conflicting evidence with respect to crucial overlapping factual issues. The findings of fact adopted verbatim by the Court's opinion encompasses five pages of extensive findings, many of which overlap matters raised by Counterclaim.

II

The result of the ruling in the Medtronic case is that the basic right to a jury trial of common substantial issues

is lost when equitable rights are also in the case. The ruling allows the trial court pursuant to Fed. R. Civ. P. 38(b) on its own motion to strike jury demands of common substantial issues when equitable rights are also in the case.

In this action Benda answered Medtronic's Complaint for Declaratory Action by agreeing that there was an actual controversy between the parties with respect to the meaning of the restrictive covenant.

Benda asserted two affirmative defenses and a three count legal counterclaim. At the time the Answer, Affirmative Defense, Jury Demand and Counterclaim were filed, there was nothing pending except a purely legal action between the parties. Only on the eve of trial did Medtronic insert a request for equitable relief in addition to declaratory relief. On the same eve the trial court took it upon itself to deny Benda his constitutional right to

have a jury of his peers decide the facts of this case.

Benda has alleged 14 sets of facts which he contends violate both the Illinois and Federal Antitrust Act. While some of these sets of fact issues overlap the issues of the action tried, Benda has alleged additional facts which are independent of the fact issues decided. In addition, he contends that Medtronic, in order to increase market share above 70% of his territory, required and trained him to begin creating new markets, i.e., increasing market share by increasing his patient population via relaxation of pacing indication. In other words, to encourage implantations where they were not clinically proven to be needed in an effort to stomp the competition.

The United States Supreme Court specifically addressed this situation in Beacon Theatre, Inc. v. Westover, supra.

In Beacon the Supreme Court, noting that the Declaratory Judgment Act specifically preserved the right to a jury trial for both parties, held that if the Defendant would have been entitled to a jury trial in a treble damage suit against the Plaintiff, it could not be deprived of that right merely because the Plaintiff took advantage of the availability of declaratory relief to sue the Defendant for injunction first, since the right to trial by jury applied to treble damage suits under the antitrust laws and was, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade. Holding that whatever injunctive relief the Plaintiff might be entitled to could be granted by the Court after a trial of the issues of fact by a jury, the Court announced that the Defendant was entitled to have the factual issues of the cause determined by a jury in advance of any

decision concerning the equitable issues raised by the Plaintiff.

III

The procedure used by the Court of Appeals in the Medtronic case which adopted verbatim the trial court's opinion as that of the Court of Appeals, adding only incidental language and failing to address issues raised by Appellants, is a serious departure from the accepted and usual course of judicial proceeding guaranteed by the right of appeal. The arbitrary elimination of issues by the Court of Appeals in this case authorizes a discretionary piecemeal review of issues by the Court of Appeals and is a serious departure from the accepted and usual course of judicial proceeding.

The Court of Appeals failed to address the jury issue other than to state briefly that the Court could find no merit in Appellants' impressions. The Court

utterly failed to address the overlapping findings issue.

The Court of Appeals failed to address the issue that the restrictive covenant was intended to prevent competition per se.

The Court of Appeals failed to address the equitable prerequisite issues of unclean hands and irreparable harm.

The Court of Appeals failed to address the constitutional issue of freedom of speech and assembly despite the fact that the trial court itself first raised this issue.

The Court of Appeals failed to address the applicability of Federal Rule 65 and the specificity requirements despite the fact that the findings of fact fail to state from whom the Appellants were enjoined from contacting.

The Court of Appeals accused Appellant of raising every conceivable argument "under the sun". Appellant raised eight

simple issues: (1) the jury demand; (2) competition per se; (3) equitable prerequisite; (4) First Amendment violations; (5) specificity under Rule 65; (6) long-term custsomer relationships; (7) public policy, and (8) interpretation of attempt to divert.

Of the seven issues the Court of Appeals addressed two issues: (1) long-term customer relationships; and (2) public interest; and held there was no jury issue to be decided.

Courts of appeal have a duty to determine the questions raised by appellants. Leahy v. U.S. (9th Cir. 1959) 272 F.2d 487, Empire Life Insurance Company of America v. Valdak Corporation (5th Cir., 1972) 468 F.2d 334.

Implicit in the right to appeal is the right to have the issues reviewed. Benda's First Amendment right of free speech and assembly is seriously curtailed

by the restrictive covenant. In fact, the trial court discusses the issue and raised it during the course of the trial. There is case law supporting Benda's position, Aberti v. Cruise, 383 F.2d 268 (1971), Consolidation Coal Co. v. Disable Minors, 442 F.2d 1261 (1971).

Benda's right to a jury trial contemporaneously with the trial of the equitable issues is mandated by this Court. Yet, the Court of Appeals does not even mention the Beacon, supra, case and cites Dairy Queen, Inc. v.Wood, supra. The Supreme Court held in the Dairy Queen case that the counterclaims and affirmative defenses be decided by a jury before the Court decides the equitable claims. It is the relief sought, not the factual issues, which determines the nature of a claim vis-a-vis legal or equitable. Hence, Defendant's affirmative defenses and counterclaims are purely legal. The factual issues of the

Complaint overlap those of the Counterclaim even though the Counterclaim goes beyond the restrictive covenant in alleging other restraints of trade practiced by Medtronic.

Trying the issues as dictated by the Supreme Court is done commonly and is an exercise in judicial efficiency. By trying the legal and equitable issues together before a jury the Court saves time by avoiding a second trial. The additional time needed for a jury trial would simply encompass picking a jury and some additional evidence on the fact issues which go beyond the declaratory claim.

IV

The decision of the Court of Appeals in the Medtronic case is consistent with the decision of the Court of Appeals for the Seventh Circuit in Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d

795 (1981). Machlett involved the sale of a company that manufactured and sold stationary x-ray units and related components. The sellers covenanted not to engage in any business directly or indirectly competing with the business they were selling to purchasers. A short time later, the sellers established a new company that manufactured mobile x-ray equipment and the purchasers brought suit requesting a preliminary injunction precluding further competition. The district court granted the preliminary injunction.

Upon appeal the appellate court vacated the preliminary injunction and discussed the harmful effect of restricting a company that serves the public's health care interest. The court noted that the sellers had made many contributions to the x-ray industry and x-ray medicine and that precluding them from engaging in the

market would inhibit further contributions and disserve the public.

Benda's working relationship with physicians was conducive to the furtherance of better, safer and more efficient medical care. Restricting this relationship by preventing Benda from participating with and assisting physicians, where needed and most often requested, also acts to disserve the public's interest.

V

The determination of common substantial issues and the subsequent adoption by the Court of Appeals in the Medtronic case hinders substantially and may prevent the determination by a jury of the issues of whether or not the new employment agreements in combination with the requirement to create an unnecessary pacemaker market was an unreasonable restraint of the salesman's trade.

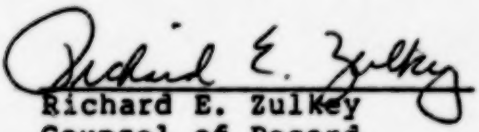
Ironically, Medtronic is currently seeking to amend its Complaint seeking damages arising out of the alleged breach of the restrictive covenant. Medtronic now seeks damages upon a contract which has been declared valid by findings of fact without a jury, some of which facts were hotly contested.

The very reason for the procedure this Court implemented in 1962 has now been thwarted. Medtronic achieved its declaratory and equitable remedy, is back for a legal remedy and Benda has yet to receive his jury trial.

CONCLUSION

Petitioner was wrongfully deprived of a jury trial as well as a proper review of the issues raised by appeal. Wherefore, Petitioner prays that this Honorable Court grant his petition for certiorari.

Respectfully submitted,



Richard E. Zulkey
Counsel of Record

November, 1982